INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	6
Appendix A	7
Appendix B	9

CITATIONS

Cases:

Bon Hennings Logging Co. v. *National Labor Relations Board*, 308 F. 2d 548	4
National Labor Relations Board v. *Bradford Dyeing Ass'n*, 310 U.S. 318	5
National Labor Relations Board v. *Cross*, 346 F. 2d 165, certiorari denied, 382 U.S. 918	4
National Labor Relations Board v. *Davis Motors, Inc.*, 192 F. 2d 782	5
National Labor Relations Board v. *Mid-Co Gasoline Co.*, 183 F. 2d 451	4
National Labor Relations Board v. *Reliance Fuel Corp.*, 371 U.S. 224, reversing 297 F. 2d 94	4, 6
National Labor Relations Board v. *Townsend*, 185 F. 2d 378, certiorari denied, 341 U.S. 909	5
National Labor Relations Board v. *Vulcan Forging Co.*, 188 F. 2d 927	4
Polish National Alliance v. *National Labor Relations Board*, 322 U.S. 643	5
Pueblo Gas & Fuel Co. v. *National Labor Relations Board*, 118 F. 2d 304	4

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

	Page
Section 2(6)	3, 9
Section 2(7)	3, 4, 9
Section 8(a)(1)	2, 9
Section 8(a)(3)	2, 9
Section 10(a)	4, 10

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 907

MARBRO FOOD SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 14–17) is reported at 366 F. 2d 477. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 4–44)[1] are reported at 152 NLRB 826.

JURISDICTION

The decree of the court of appeals (App. A, *infra*, pp. 7–8) was entered on October 25, 1966. The petition for a writ of certiorari was filed on December 27, 1966.

[1] "R." refers to the "Transcript of Record" filed in the court of appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the operations of a company which makes substantial local sales of bakery products and sandwiches to a customer, who receives directly from out-of-state goods valued in excess of $50,000 per year, affects commerce within the meaning of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151 *et seq.*), are set forth in Appendix B, *infra*, pp. 9–10.

STATEMENT

The Board found that petitioner violated Section 8(a)(1) of the Act by coercively interrogating its employees, promising them wage increases, and threatening to close its plant—in order to discourage its employees from supporting the Union's[2] organizational campaign (R. 22–23). The Board further found that petitioner violated Section 8(a) (3) and (1) of the Act by discharging one employee because of his union activities (R. 16), and by forcing three others to quit in order to decrease the Union's chances of winning a forthcoming representation election (R. 36). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to rein-

[2] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 537.

state with back pay the employees discriminated against (R. 38–44). The only issue raised here is whether the Board had jurisdiction over petitioner. The facts pertinent to this issue are as follows:

Petitioner maintains a plant in Denver, Colorado, where it makes bakery products and sandwiches which it sells and distributes to vending machine operators and other retail outlets (R. 5, 6; 111–112). During the year ending June 24, 1964, when the complaint in this case was issued, petitioner sold and distributed goods valued at more than $50,000 to Automatic Catering, Inc.; the latter is petitioner's principal customer and the two firms are related by common ownership and management (R. 5–6; 111–112, 120, 132, 168, 172–173).[3] Automatic Catering, also located in Colorado, annually sells and distributes products (including petitioner's) valued at more than $500,000, and annually receives direct shipments of goods valued in excess of $50,000 from points outside Colorado (R. 5; 44–45, 168, 172–173).

Upon these facts, the Board found that petitioner's operations affected commerce within the meaning of Sections 2(6) and 2(7) of the Act, and that they met the Board's self-imposed standards for the exercise of its statutory jurisdiction (R. 5–6). The court of appeals sustained the Board's findings and enforced its order (Pet. 14–17).

---

[3] Gerald Marcove is president of petitioner, vice-president of Automatic Catering, and a stockholder in both companies. Lucien Sebo is general manager of petitioner and business manager of Automatic Catering. (R. 6; 111, 120, 132.)

ARGUMENT

It is settled that the Board's statutory jurisdiction to prevent unfair labor practices "affecting commerce" (Sections 10(a) and 2(7) of the Act, *infra*, pp. 9–10) is coextensive with "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226. The court of appeals was clearly correct in holding that petitioner's large sales to a buyer (Automatic Catering), who made substantial purchases direct from out-of-state, brought petitioner "within the constitutional reach of Congress" (Pet. 16).[4]

The court below (Pet. 16–17) properly deemed "immaterial" petitioner's basic argument (Pet. 8, 12) that Automatic Catering could obtain from other sources the goods usually supplied by petitioner if

[4] Accord: *National Labor Relations Board* v. *Cross*, 346 F. 2d 165, 167 (C.A. 4), certiorari denied, 382 U.S. 918; *Bon Hennings Logging Co.* v. *National Labor Relations Board*, 308 F. 2d 548, 551 (C.A. 9); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451 (C.A. 5); *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927 (C.A. 6); *Pueblo Gas & Fuel Co* v. *National Labor Relations Board*, 118 F. 2d 304, 306 (C.A. 10).

It is apparent on the face of its opinion that, contrary to petitioner (Pet. 7, 10, 12–13), the court below did not sustain the Board merely on finding that the Board's self-imposed jurisdictional standards were satisfied, but made a distinct finding that the facts were sufficient to establish statutory jurisdiction as well. However, it was relevant that the Board's standards were also met, since their application turns on the amount of direct or indirect flow of goods across state lines (Pet. 15, 16)—facts obviously pertinent to the existence of statutory jurisdiction.

the latter were closed down by a labor dispute. The fact that substitute facilities may be available to fill the void created by a shutdown of the immediate employer's business does not deprive the Board of jurisdiction. *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 326. For petitioner's unfair labor practices, if left unchecked, may spread to other sources of supply or even to Automatic Catering itself (see n. 3, *supra*). *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 648.[5] "[T]he Board's jurisdiction can attach, as here, before actual industrial strife materializes to obstruct * * * commerce." *National Labor Relations Board* v. *Bradford Dyeing Ass'n, supra*, at 326.

Nor is it significant, as petitioner urges (Pet. 8), that it did not receive goods from out of state, that the goods made by it were not sold out of state, and that there was no showing of the precise connection between the goods sold by it to Automatic Catering and the goods purchased by Automatic Catering from out of state. Though its "activities * * * in isolation might be deemed to be merely local," petitioner's function as a substantial supplier of Automatic Catering sufficiently "interlac[ed]" its operations with "business across state lines" to warrant the Board's assertion of jurisdiction. *Polish National Alliance* v. *National Labor Relations Board, supra*, at 648. See cases cited *supra*, n. 4. "'[F]urther evidence and

[5] See also *National Labor Relations Board* v. *Davis Motors, Inc.*, 192 F. 2d 782 (C.A. 10); *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 382 (C.A. 9), certiorari denied, 341 U.S. 909.

* * * findings on the manner in which a labor dispute at [petitioner's plant] affects or tends to affect commerce' " were unnecessary. *National Labor Relations Board* v. *Reliance Fuel Oil Corp., supra,* at 225, reversing 297 F. 2d 94 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

JANUARY 1967.

APPENDIX A

United States Court of Appeals for the Tenth Circuit

No. 8572

(Filed, United States Court of Appeals, Tenth Circuit, October 25, 1966)

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MARBRO FOOD SERVICE, INC., D/B/A FAB'S FAMOUS FOODS COMPANY, RESPONDENT

DECREE

Before: MURRAH, *Chief Judge,* and BREITENSTEIN and SETH, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, on May 25, 1965. The Court heard argument of respective counsel on July 19, 1966, and has considered the briefs and transcript of record filed in this cause. On September 15, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Marbro Food Service,

Inc., d/b/a Fab's Famous Foods Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

JEAN S. BREITENSTEIN,
Judge, United States Court of Appeals for the Tenth Circuit.

Dated: October 25, 1966.
A true copy.
TESTE:

ROBERT B. CARTRIGHT,
Clerk.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition

of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1967